



IN THE COURT OF APPEAL OF KENYA

AT NYERI

CIVIL APPEAL 52 OF 2005

**HIGHWAY FURNITURE MART LIMITED
APPELLANT**

AND

THE PERMANENT SECRETARY OFFICE OF THE PRESIDENT

**THE ATTORNEY GENERAL
RESPONDENTS**

**(An appeal from the ruling of the High Court of Kenya at Nyeri (Lady Justice Okwengu) dated 17th
November, 2004**

in

H.C.C.C. NO. 42 OF 1998)

JUDGMENT OF THE COURT

The appellant is aggrieved by part of the ruling of the superior court, (Okwengu J.) dated 17th November, 2004 wherein the superior court, having dismissed the application for review of the judgment made by the Attorney General (Respondent), nevertheless invoked its inherent jurisdiction under **Section 3 A** of the *Civil Procedure Act suo motto* and set aside the decree dated 13th January, 1999 and all subsequent decrees and further ordered that a decree be re-drawn and approved by the Deputy Registrar in accordance with the judgment of 16th December, 1998.

By a building contract dated 15th May, 1986 between the appellant and the Government of Kenya, the appellant agreed to undertake the erection and completion of Kirinyaga District Headquarters at Kerugoya at contract sum of Kshs.20,660,503/10 the date of completion being 25th November, 1987. It seems that the works were not completed within the contract period because the Certificate of Practical Completion from the Ministry of Works is dated 12th October, 1990. Thereafter there was a dispute on final accounts. By a meeting held on 6th August, 1996, the Government's position was that the final accounts for the project was Shs.38,599,191/= against the approved contract sum of the project of Shs.36,639,200/00. The Government decided to seek authority of the Treasury for the additional Shs.1,960,991/95. According to the appellant, however, the final account was Shs.47,517,458/45. The dispute was not resolved and by a

letter dated 14th January, 1998, the appellant demanded from the Attorney General the balance of Kshs.11,257,118/= with interest at 36% from 12th October, 1990 till payment in full. On 17th February, 1998 the appellant filed Nyeri *High Court Civil Case No. 42 of 1998* through M/s. Bali – Sharma & Bali – Sharma Advocates.

It is a three-paragraph plaint which we quote in *extenso* thus:

“1. The plaintiff’s claim against both defendants is for the sum of Shs.11,257,118/= plus 36% interest per annum from 12th October, 1990 being balance due and owing in respect of construction work carried out by the plaintiffs to construct District Headquarters WP item No. DO1/GE/KYE 403 JOB No. 1011A full particulars whereof are within the defendant’s knowledge.

2. Despite demand duly made and notice of intention to sue in default of payment given, the defendant refuses and/or has neglected to pay the sum claimed or at all.

3. The cause of action arose at Kerugoya within the jurisdiction of this Honourable court.

REASONS WHEREFORE the

Plaintiff prays for judgment for:

1. The principal sum of shilling 11,257,118/= together with interest thereon at court rate from date hereof until payment in full.

2. Costs of this suit together with interest thereon at court rate from the date hereof until payment in full.

3. Any other relief that the Honourable court deems just”.

On 22nd October, 1998 the Government paid Shs.1,960,985/95 to the appellant by a cheque.

The Attorney General did not attend the hearing of the suit on 27th November, 1998 and the hearing proceeded *ex parte*. Mr. Joseph Waitiki Ndegwa, the Managing Director of the appellant, gave evidence in support of the claim. He disclosed in his evidence that he had been paid Shs.1,960,985/95 since the filing of the suit and prayed for “judgment for Shs.9,296,132/= plus interest until payment in full plus costs”. The superior court (Juma J) by a terse judgment (1½ pages) entered judgment for the appellant saying in the relevant part:

“Having heard the Managing Director of the Plaintiff company testify and having perused the exhibits produced in support of the plaintiff’s case, I am satisfied that at the time the suit was filed there was due and owing to the plaintiff by the defendant the sum of Kshs.11,257,118/=. Since the suit was filed a sum of Kshs.1,960,985/95 has since been paid leaving a balance of Kshs.9,296,132/=.

Therefore I enter judgment for the plaintiff against the defendant in the sum of Kshs.9,296,132. The plaintiff shall have costs of this suit and interest as prayed in the plaint”.

A decree issued on 13th February, 1999 showed that judgment for Shs.9,296,132/= was entered together with interest at 36% per annum from 12th October, 1990 until date of judgment on 16th December, 1998 and 14% from 17th February, 1998 till payment in full and computed the claim thus:

“Principal amount awarded - Shs. 9,296,132.00

Interest on (sic) 36%

from 12th October 1990 till

16th December, 1998 - Shs.30,119,467.68

Interest on (sic) 14% from

18.12.1998 to 16.12.1998 - Shs. 1,084,548.70

Shs.40,508,148.40”.

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The Certificate of Order Against the Government dated 8th February, 1999 issued pursuant to **Order XXVIII rule 3 Civil Procedure Rules** indicated the decretal sum as Shs.40,890,050/50 inclusive of taxed costs of Shs.389,882/10.

The decree was re-issued on 20th February, 2002 showing that the respondent was adjudged to pay Shs.11,257,118/= and that the decretal amount was Shs.45,967,256/80. Further interest and costs plus Shs.70,000/= court collection fees were added enhancing the decree to the aggregate decretal sum to Shs.48,774,267/40.

It appears that the Office of the President which was the client Ministry in the building contract felt that the claim against the Government had not been properly adjudicated upon. By a letter dated 19th June, 2000 the Attorney General while admitting that the Government’s claim had not been properly handled by the State Counsel who appeared for the Government and while intimating that he had referred the matters concerning the case to the Kenya Anti-Corruption Authority, nevertheless, advised the Government to pay. Since then the Government has been paying the decretal amount by instalments.

On 14th July, 2004 the Attorney General filed an application for review under **Order XLIV rule 1 and 4** of the *Civil Procedure Rules* seeking a review of the “*judgment*” of Juma J delivered on 16th December, 1998 on the ground that there was an error apparent on the face of the judgment. The application was supported by the affidavit of Waigi Kamau, a State Counsel, sworn on 13th July, 2004 and by his further affidavit sworn on 29th October, 2004.

Waigi Kamau deposed, among other things, that, nowhere in the judgment did the judge award interest at the rate of 36%; that such an award would have to be proved as special damages which was not done; that the applicant had to date paid Shs.52,913,869/05; that the respondent was still claiming a sum of Kshs.17,479,560/46 as the outstanding balance, that he had discovered that the appellant had been grossly overpaid using public funds prompting the application, and that the court should declare the decree at variance with the judgment of the court and order the respondent to refund the excess monies collected from the applicants.

The superior court considered the application and made findings that the interest prayed for in the plaint was interest at court rates; that there was no prayer for interest at 36% per annum nor did the plaintiff either in his pleading or evidence state the basis of the rate of interest at 36%; that the court did not therefore award that rate of interest; that there was an error apparent on the face of the record but the error is not on the judgment delivered on 16th December, 1998 but on the decree extracted from the judgment as the interest on the decree ought to have been at 14% from 18th February, 1998 to date of payment and not at 36% from 12th October, 1990. For that reason, the learned judge dismissed the application for review of the judgment but nevertheless held as follows:

“Nevertheless since it is apparent that there is an error on the face of the record which error has resulted in the execution of a decree which includes an amount of Kshs.30 million on claim for interest which claim was neither prayed for nor proved nor awarded in the judgment there is clearly an

abuse of the court process which the court cannot ignore. The court therefore moves suo motto and invokes its inherent powers under section 3 A of the Civil Procedure Act to correct this glaring injustice and hardship to the defendants by setting aside the decree dated 13th January, 1999 and all subsequent decrees and further order that a decree shall be re-drawn and approved by the Deputy Registrar in accordance with the judgment of 10th December, 1998. For avoidance of doubt it is hereby reiterated that judgment is for the sum of Kshs.9,296,132/= and that costs and interest shall be on the original claim of Kshs.11,257,118/= at court rates from February, 1998 (which is date on the plaint. Those shall be orders of this court”.

That is the background from which this appeal was filed.

There are three grounds of appeal, namely:

- “1. The learned Judge of the superior court erred in law in making an order after she had dismissed the application of the respondent.***
- 2. The learned judge had no jurisdiction to make any order suo motto and had no jurisdiction to invoke inherent powers under section 3 A of the Civil Procedure Act and the order is manifestly wrong and cannot stand.***
- 3. That the superior court did not deal with the period of delay from the date of judgment i.e. 16th December, 1998 to making of the application dated 13th July, 2004 a period of 5 years and 7 months making the application and the orders were against natural justice as relating to the appellants right to execute the decree”.***

Mr. Mahan, learned counsel for the appellant submitted in support of the appeal, amongst other things, that the learned Judge had no jurisdiction to sit on appeal on the judgment of Juma J; that learned Judge was *functus officio* after she dismissed the application; that there is no such rule as *suo motto* in the *Civil Procedure Rules* and that **section 3 A** of *Civil Procedure Act* did not apply.

Mr. Kamau for the respondent on his part submitted that the appellant in drawing the decree included an interest rate which was not prayed for in the plaint, that respondent went to court for interpretation of the interest rate awarded; that interest rate above court rate was to be pleaded and proved that the Judge had unlimited jurisdiction under **section 3 A** *Civil Procedure Code* to correct an injustice and that the court was not *functus officio*.

It is apparent from the three grounds of appeal that the appeal is not against the merits of the decision particularly the findings of fact by the superior court; that appellant did plead but did not pray for the interest rate at 36%; that the appellant did not state in the evidence of its managing director the basis of the rate of interest of 36%; that the court did not award interest rate at 36%; that there was no error on the judgment and that the error was on the decree which included an amount of Shs.30 million as claim for interest which was not prayed for or awarded in the judgment. The appeal concerns the jurisdiction of the court to set aside the decree and order the correction of the decree so that it would agree with the judgment. That notwithstanding, it is necessary to determine the rate of interest awarded in the judgment because the appellant’s counsel maintained in the superior court and still maintains before us that the rate of interest at 36% was pleaded in paragraph 1 of the plaint and that by the phrase: **“Costs of this suit and interest as prayed in the plaint”** in the judgment the judge indeed awarded that interest rate.

It is also necessary to determine the validity of the rate of interest awarded because the jurisdiction of the superior court largely depend on the nature of error or errors that the judge assumed jurisdiction to correct.

As a matter of pleadings and evidence it is true as found by the learned Judge that while the appellant pleaded in paragraph 1 of the plaint for interest at the rate of 36% the appellant did not, however, pray for the rate of interest at 36% as a relief and did not give evidence at all concerning that rate of interest. By

Order VII rule 6 of the *Civil Procedure Rules* (CP Rules) the plaintiff should state specifically the relief which the plaintiff claims. The relief claimed by the appellant was specifically pleaded in paragraph 3 (1) of the plaint **“as the principal sum of Shs.11,257,118/= together with interest thereon at court rate from the date of the plaint until payment in full”**. The Chief Justice from time to time fixes the ceiling of the court rate interest under **section 26** of the *Civil Procedure Act*. The prevailing court rate is 14% p.a. which is the rate applied by Okwengu J.

The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In ***Later v Mbiyu*** [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:

“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest”.

(See also the Uganda case of ***Lwanga v Centenary Rural Development Bank*** [1999] 1 EA 175).

If the plaintiff was indeed claiming interest on the principal sum at 36% it is surprising that Joseph Waitiki Ndegwa who gave evidence in support of the claim did not refer to that rate of interest or give evidence of circumstances which could have justified the award of interest above the court rates. There was no explanation why the appellant had to wait for more than 7 years to file the suit. It is evident that the claim was incontestably unproved.

The judgment delivered by Juma J did not specifically deal with the claim for interest at 36%. That claim as computed in the decree amounted to Shs.30,119,467/68 which exceeded the principal sum by more than three times. It was undoubtedly a very large claim. It is inconceivable that Juma J could have allowed such a large claim without specifically saying so and without assigning any reasons. The award of interest at 36% cannot be simply implied from the judgment. We are satisfied that Okwengu J correctly construed the judgment of Juma J that court did not award interest at the rate of 36%.

Lastly and more importantly, the claim could only have been allowed if it was maintainable in law. **Section 26 (1)** of the *Civil Procedure Act* which enacts the procedural law governing the award of interest by court, provides:

“26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit”.

In this case the interest referred to in paragraph 1 of the plaint at 36% from 12th October, 1990 is interest for a period prior to the institution of the suit as the suit was instituted on 17th February, 1998. Although the appellant never gave justification for the operative date (i.e. 12th October, 1990), it is apparent that that was the date when the CERTIFICATE OF PRACTICAL COMPLETION of the project was given by the Ministry of Works. It is evident that the appellant claimed interest for a period of more than 7 years prior to the institution of the suit.

In ***Gulam Husein v French Somaliland Shipping Co. Ltd*** [1959] EA 25 the predecessor of this Court while referring to **section 34** of *Indian Code of Civil Procedure* which is in *pari materia* with **section 26** of the *Civil Procedure Act* said, obiter:

“Section 34 of the Indian code was considered by the Privy Council in the case of *Bengal Magpur Railway Co. v Ruttanji Ramji* 1938 AIR PC & 67 and it was indicated by their Lordships that the section has no application to interest prior to date of the suit, which is a matter of substantive law. It

was also indicated that the power conferred is to order interest upon the principal sum adjudged from the date of suit to the date of the decree but from that date to the date of payment it may be ordered to be paid upon the aggregate of the principal and interest as at the date of the decree”.

That construction of **section 26 (1)** of the *Civil Procedure Act* was adopted by this Court in ***New Types Enterprises Ltd v Kenya Achand Insurance Company Ltd*** [1988] KLR 380 where the Court held that the award of interest for any period prior to the filing of the suit is a matter of substantive law.

Section 34 (1) of the Indian Code of Civil Procedure is still intact and is in the same language as **section 26 (1)** of the *Civil Procedure Act*, (see Mulla – *The Code of Civil Procedure 16th Edition vol.1 page 505*). At page 511 of Mulla (supra) the authors state:

“Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (that is interest accrued prior to the institution of the suit).

..... It has been said the right to interest prior to the suit is a substantive one whereas Pendente Lite, it is one of procedure within the discretion of the court”.

The authors further show that according to the substantive law, interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between parties (see pages 511 – 514) of Mulla (supra).

In this case the building contract did not provide for payment of interest. The appellant did not prove before the trial Judge that interest before the institution of the suit was awardable in law in the circumstances of the case. We have come to the inescapable conclusion that the claim for interest at 36% for the period prior to the institution of the suit was not maintainable in law and was illegally included in the decree prepared by the appellant’s advocates.

The appellant contends that Okwengu J had no jurisdiction to set aside the decree. It is not correct to say that the learned Judge sat on appeal against the judgment of Juma J for Okwengu J did not find any error in the judgment and left it intact.

By **Order XX Rule 6 (1)** the decree should agree with the judgment and by **Order XX Rule 7**, in case of dispute the decree is settled by a judge before it is issued by the court. A decree which is not in conformity with the judgment is liable to be reversed and set aside for a party to the suit cannot suffer because of the errors committed by the court. The court would, however, be *functus officio* if the decree conforms with the judgment, which is not the case here.

The decree in this case was, in our view, a nullity as it included a very large claim (over Shs.30 million) which was not awarded in the judgment of the court.

The parties were fully heard by Okwengu J on the issue of the claim of Shs.30 million comprising interest before the institution of the suit and the court was satisfied that the inclusion of the claim in the decree was erroneous. The superior court had a duty to see that the appellant only recovered what it was entitled to under the judgment and had jurisdiction to set aside the decree which was a nullity *ex dibito justitae*. Moreover, the superior court had inherent equitable jurisdiction to prevent the appellant from unjustly enriching itself at the great expense of the respondent and from public funds.

We have come to the conclusion that the superior court had inherent jurisdiction to set aside a decree which was a nullity and that this appeal has no merit.

For those reasons, the appeal is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 9th day of June, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR